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No. 03-858

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IN THE

Supreme Court of the United States

UAW-LABOR EMPLOYMENT AND TRAINING CORP., *et al.*,
Petitioners,

v.

ELAINE L. CHAO, Secretary of Labor, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

CASES — Page

Associated Builders and Contractors of Southern California, Inc. v. Nunn, 356 F.3d 979 (9th Cir. 2004) 1, 2, 6, 7
Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts, 507 U.S. 218 (1993) 4
Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 5
Hanna Mining Co. v. Marine Engineers, 382 U.S. 181 (1965) 3
Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132(1976) 5
Longshoremen v. Davis, 476 U.S. 380 (1986) 3
Metropolitan Life Ins. Co. v. Massachusetts, 471U.S. 724 (1985) 4
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 4
Rochester Mfg. Co., 323 NLRB 260 (1997) 3, 6
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 1, 3, 4
Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978) 4, 5

EXECUTIVE ORDER

Executive Order 13201, 66 Fed. Reg. 11221 (2001) 3, 5

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REPLY BRIEF FOR PETITIONERS

1. At the threshold, the Respondents assert that the decision below "does not conflict with any decision of this Court or any other court of appeals." Br. in Opp. 6. That assertion is incorrect.

As our certiorari petition demonstrates, Pet. 10-14, the D.C. Circuit's reformulation of the *Garmon*[1] preemption doctrine is fundamentally inconsistent with this Court's *Garmon* doctrine jurisprudence. And, since the filing of our petition (but prior to the filing of the brief in opposition), the Ninth Circuit has rendered a decision that—drawing on this Court's *Garmon* precedents—is directly at odds with the D.C. Circuit's decision in the instant case. *See Associated Builders and Contractors of Southern California, Inc. v. Nunn*, 356 F.3d 979, 987 (9th Cir. 2004).

[1] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

According to the D.C. Circuit, the *Garmon* doctrine is *not* a "'field' preemption" doctrine but rather a set of discontinuous preemption rules that "operat[e] only as to activities arguably protected or prohibited, *not* to ones simply left alone [by the NLRB], even if left alone deliberately." Pet. App. 5a (emphasis in original). Thus, once "the Board has decided that [a labor relations] activity is not prohibited," *id.*—but rather left to employer or union option as a permissible activity—that activity may be regulated by governmental bodies other than the NLRB in a manner that "conflicts with the 'regulatory scheme' the Board has established," *id.* at 4a.

In contrast, the Ninth Circuit understands the *Garmon* doctrine to be what this Court's decisions show it to be—a field preemption doctrine:

> "*Garmon* preemption prohibits states from regulating fields that Congress intended to occupy fully through the creation of a continuum between conduct that is either protected or prohibited by the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). The purpose of *Garmon* preemption is 'to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA.' *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986) (quoting *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 289 (1986))." *Associated Builders and Contractors*, 356 F.3d at 987.

In the Ninth Circuit, then, the *Garmon* doctrine provides protection against regulation by other governmental bodies of labor relations conduct across the "continuum between conduct that is either protected or prohibited by the NLRA," including conduct that the NLRB has determined the NLRA permits but does not require. And, as the court below acknowledged, "under [such a] 'field' preemption [theory]" —as opposed to the D.C. Circuit's *Garmon* theory of the

court below—Executive Order 13201, the order at issue here, "is preempted because it conflicts with the 'regulatory scheme' the Board has established" by its decision in *Rochester Mfg. Co.*, 323 NLRB 260 (1997). Pet. App. 4a-5a.

2. The Respondents' main effort to square the D.C. Circuit's decision with this Court's decisions is to misstate what the *Garmon* opinion says. According to the brief in opposition (at p. 8), "*Garmon* itself recognized that, when the NLRB has 'decide[d] that an activity is neither protected nor prohibited' by the NLRA, state or local regulation of the activity is not preempted under the principles articulated in that case. 359 U.S. at 245." What the *Garmon* opinion actually says is that "the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S. at 245. And, the point of that statement is to lay the groundwork for such decisions as *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181 (1965), and *Longshoremen v. Davis*, 476 U.S. 380 (1986). *See* Pet. 11 n. 5 (discussing *Hanna Mining* and *Davis*); Br. in Opp. 8 (discussing *Davis*).

An NLRB decision that an activity is neither protected nor prohibited "raise[s] the question whether such activity may be regulated by the States," because the decision's preemptive effect depends on the Board's basis for concluding that the activity is neither protected nor prohibited by the NLRA. Where, to take the example that has emerged, the Board holds that certain conduct is neither protected nor prohibited because the conduct concerns an individual who is not covered by the NLRA, there is no reason for preempting regulation by the states (or by other governmental bodies) of that conduct. And, *Hanna Mining* and *Davis* so recognize. Simply stated, non-NLRB regulation of conduct that is *not covered by the NLRA* presents no danger of conflict with "Congress' 'integrated scheme of regulation.' *Garmon*, 359

U.S. at 247." *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 225 (1993).

But it is an entirely different matter where the Board's determination concerns "conduct subject to the regulatory jurisdiction of the NLRB," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985), and the Board's determination is that the Act neither protects nor prohibits the conduct in question but rather leaves it to employer or union option as permissible conduct. The Respondents tacitly recognize as much—and the thereby tacitly admit that the D.C. Circuit's decision cannot be squared with this Court's *Garmon* doctrine precedents—by acknowledging that where particular labor relations conduct has been "left unregulated by the NLRB for affirmative reasons of statutory policy under the NLRA," the Board's "choice . . . may be insulated [by NLRA preemption] from conflicting state regulation.". Br. in Opp. 11 n. 7.

No other conclusion is consistent with this Court's decisions. The office of NLRA preemption is "to avoid conflicting regulation of conduct [coming within the regulatory authority of the NLRB] by various official bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-286 (1971), and to do so by "prevent[ing] a State [or other law maker] from regulating within . . . a zone protected and reserved . . . for NLRB jurisdiction," *Associated Builders and Contractors of Massachusetts*, 507 U.S. at 226-227.[2]

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[2] For sake of completeness, we note that *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), cited and discussed at Br. in Opp. 9, is inapposite. In *Garmon*, the Court refused "to find withdrawal from the States of power to regulate . . . where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." 359 U.S. at

To be sure, the Respondents do make a failed attempt to reconcile their telling concession regarding the preemptive effect of the Board's "choice" that particular labor relations conduct should be "left unregulated" with their defense of the decision below by asserting that such a Board "choice" would be "insulated from conflicting state regulation on non-*Garmon* grounds" under "the doctrine of *Machinists* pre-emption." Br. in Opp. 10-11 n. 7, citing *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976).

The difficulty is that the *Machinists* preemption doctrine does *not* address conduct that the NLRB may or may not regulate as a matter of "choice." Br. in Opp. 11 n. 7. "The *Machinists* rule creates a free zone from which all regulation, 'whether federal or State,' [*Machinists*, 427 U.S.] at 153, is excluded." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989).[3] The truth of the matter is that the Board's "choice" to "le[ave] unregulated" certain labor relations conduct is protected by the *Garmon* preemption doctrine or not at all. And, this Court's decisions

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243 (citation omitted). In *Sears*, the Court gave meaning to that limit by "refus[ing] to apply the *Garmon* guidelines in a literal, mechanical fashion" so as to "sweep[] away state-court jurisdiction over [trespassory] conduct [that was] traditionally subject to state [property law] regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." 436 U.S. at 188. The conduct regulated by Executive Order 13201 is quite plainly not conduct that is traditionally subject to state or to Executive Branch regulation.

[3] The *Machinists* rule rests on the understanding "that Congress intended to give parties to a collective-bargaining agreement the right to make use of 'economic weapons,' not explicitly set forth in the Act, free of governmental interference," and "that Congress meant that these activities . . . were not to be regulable by States any more than by the NLRB." *Golden State Transit*, 493 U.S. at 111 & n. 8.

make it plain that the *Garmon* doctrine does protect the Board's "choice" in this regard from conflicting regulation by other governmental bodies.

Equally to the point, there is no question that the Board's determination in *Rochester Mfg., supra*, not to require employers to post notices describing employees' NLRA rights with respect to union security agreements represents precisely a "choice" that this matter be "left unregulated by the NLRB for affirmative reasons of statutory policy under the NLRA." Br. in Opp. 11 n. 7. Thus, on Respondents' own terms—but not on the D.C. Circuit's terms—that decision reflects a choice protected by NLRA preemption from conflicting regulation.

The question of whether employers should be required to post notices regarding NLRA rights is most certainly a matter within the "zone protected and reserved . . . for NLRB jurisdiction." *Associated Builders and Contractors of Massachuseits*, 507 U.S. at 227. Indeed, the brief in opposition (at p. 10 n. 6) reveals that the NLRB is currently considering "two rulemaking petitions on whether employers should be required to post notices of *Beck* rights or more expansive notices advising employees of their federal rights and obligations under the NLRA." The Board's "choice" in responding to those petitions as to whether to require such employer conduct coming within its jurisdiction is one the Board must make for "reasons of statutory policy under the NLRA."[4]

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[4] Under the D.C. Circuit's decision, the Executive Order notice requirement will be preempted should the NLRB decide to adopt a notice posting requirement, Pet. App. 5a ("a reversal of position by the Board . . . will entail a reversal of this outcome on preemption"), with the ironic effect that the consequences of failing to post the notice will be less severe, since the Board does not have the authority to impose the debarment penalty imposed by the Executive Order.

3. In the end, the Respondents abandon all pretense that the D.C. Circuit's decision in this case can be reconciled with this Court's *Garmon* doctrine precedents and simply assert that the D.C. Circuit has been wrong to treat Executive Order regulation of labor relations as subject to the NLRA preemption rules that apply to state or local government regulation of labor relations. Br. in Opp. 11-12. The Respondents do not attempt to explain why conflicting Executive Order regulation of private sector labor relations is any less disruptive of "Congress' 'integrated scheme of regulation,' *Garmon*, 359 U.S. at 247," *Associated Builders and Contractors of Massachusetts*, 507 U.S. at 225, than conflicting state or local regulation. For present purposes, however, it suffices that the D.C. Circuit *does* apply its reformulation of the *Garmon* doctrine to Executive Order regulation of private sector labor relations, *see* Pet. App. 3a-4a, and that its reformulation of the *Garmon* doctrine conflicts with this Court's *Garmon* doctrine jurisprudence.

Respectfully submitted,

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